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COMMENT.

THE REQUIREMENT OF A LICENSE TO PRACTICE OSTEOPATHY.

The law imposing qualifications upon those practicing the science of medicine has gone through a gradual evolution from the time when no qualification at all was necessary, when the charlatan and quack were free to practice on the same footing as the skilled physician, to the present when the statutes require long courses of study and difficult examinations. The courts, however, are not yet agreed as to whether these qualifications apply to the osteopath. On this point we find a very marked conflict, a division which is largely due,

of course, to the difference in the statutes of the respective States, but noteworthy also for the difference of opinion as to whether osteopathy is or is not a branch of medicine. That it is the practice of medicine, and, therefore, subject to license requirements is held in Illinois, Nebraska, Alabama and Ohio; that it is not is the opinion of the courts of Mississippi, New York, Kentucky, Pennsylvania and North Carolina.

In *Eastman v. People,* 71 Ill. App. 236, under the broad definition that "Medicine is the art of understanding diseases and curing or relieving them when possible," it was held that the osteopath is liable to the penalty imposed by the State for practicing medicine without a license. This decision was followed in *Little v. State,* 60 Neb. 749. In *Bragg v. State,* 134 Ala. 165, after reviewing the authorities exhaustively, the court holds that a statute which makes it unlawful for any person to practice "medicine or surgery without having first obtained a certificate of qualification from one of the authorized boards of medical examiners of this State," embraces those who practice osteopathy, which as a science or art includes the diagnosis of disease and the treatment thereof by a system of manipulation of the limbs and body of the patient with the hands by kneading, rubbing or pressing upon the different parts of the body. "The practitioners (of medicine) are not simply those who prescribe drugs or other medicinal substances as remedial agents, but are those who diagnose disease and prescribe or apply any therapeutic agent for its cure." In *State v. Liffring,* 61 Ohio St. 39, it was held that osteopathy was not within the meaning of the act of Feb. 27, 1896, but in *State v. Gravett,* 65 Ohio St. 289, this finding was reversed under a more recent statute.

In the recent case of *Hayden v. State,* 33 South. 653, the Supreme Court of Mississippi holds that a statute which provides that the practice of medicine shall mean to "prescribe or direct for the use of any person any drug, medicine, appliance or agency . . . for the cure" of any disease, fracture, etc., does not apply to osteopathy. The court construes the statute literally and says: "A wise legislature some time in the future will doubtless make suitable regulations for the practice of osteopathy so as to exclude the ignorant and unskillful practitioners of the art among them." This decision follows *Smith v. Lane,* 24 Hun 632, and *Nelson v. State Board,* 57 S. W. 501 (Ken.), where it was held that the board of health would be enjoined from interfering with or molesting one in the practice of his profession as an osteopath. In *Com. v. Pierce,* 10 Penn. Dist. 335, it was held that osteopathy was not within the statute, but where a practitioner of osteopathy furnishes medicines to patients or uses a sound, he is practicing medicine within its meaning. The recent case of *State v. MacKnight,* 131 N. Car. 717, decides the same way. The court says: "If it is a fraud and imposition, and injury results, the osteopath is liable both civilly and criminally. Certainly baths and diet could be advantageously prescribed to many people. Rubbing is well enough if the patient is

not rubbed the wrong way. The real complaint is that osteopaths restrict themselves to these remedies and do not resort to drugs and surgery; but that very fact establishes that they do not violate the law requiring a license to practice medicine and surgery. Doubtless there is an appeal to the imagination, but who does not know that a prescription by a physician in whom the patient has implicit confidence is oftentimes more effective than the same treatment by one in whom he has none, and that at times bread pills and other harmless prescriptions are administered with good results."

That such statutes do not prohibit the assumption of the title "doctor" by any person; that praying for those suffering from disease, or teaching that disease will disappear and physical perfection be attained as a result of prayer; and that the system known as "Christian Science" do not come within their provisions has been held in *State of Rhode Island v. Mylod,* 40 Atl. 753, 41 L. R. A. 428, and *Evans v. State,* 9 Ohio S. & C. Dec. 222.

The Legislature of Pennsylvania now has a bill under consideration which provides that all persons who shall profess to diagnose or treat disease or injury "by any method whatsoever" shall be licensed, and that the condition of such license shall be the passing before a Board of Medical Examiners of a satisfactory examination in anatomy, physiology, pathology, and diagnosis, or present satisfactory evidence of having passed such examination before a similar body in another State having equally stringent requirements. The object of this bill, at least, would seem to offer a just solution of the difficulty with which the legislatures and courts are now confronted. On the one hand it would exclude from medical practice by any system or method those not qualified by education to practice intelligently. On the other hand by merely requiring a knowledge of the elements of modern medical education it would not place too great a check upon the liberty to choose one's own method of treatment. The practitioner could practice any system subject only to liability for malpractice.

RIGHT TO ENJOIN STRIKES ON THE GROUND OF INTERFERENCE WITH INTERSTATE COMMERCE.

The recent opinion of Judge Adams of the United States Circuit Court for the Eastern District of Missouri in the case of the *Wabash R. R. Co. v. Hannahan* (Mar. 31, 1903), denying the right of the plaintiff to enjoin the officers of the Brotherhoods of Railway Engineers and Firemen from ordering a strike or otherwise interfering with the fulfillment of their obligations to interstate commerce, has awakened much comment. The Central Law Journal (Apr. 17, 1903) commenting on the decision reaches the conclusion that the case of *Re Debs,* 158 U. S. 725 (1895), holds squarely against the position taken by the court in the principal case. But

it is submitted that Judge Adams ruled correctly on the facts of the case in denying the injunction asked for.

The injunction in the Debs case was granted against the officers of the American Railway Union to desist and refrain from hindering, obstructing, or stopping any of the business of certain railroads as common carriers of passengers, freight or mails; and from compelling or inducing by threats, persuasive force or violence any of the employees to refuse or fail to perform any of their duties as employees in any of the roads engaged in interstate commerce, and from *ordering, directing, aiding or abetting* any person to commit said acts. In that case it was clear that the union was directly attempting to interfere with interstate commerce and to coerce the railroads into granting their demands by means of such interference. While in the principal case it does not appear that any *direct* interference with or molestation of interstate commerce was intended, and the court expressly retained jurisdiction of the case that all its lawful powers might be invoked to restrain such interference or molestation if any resulted.

It certainly is not well settled how far employees or labor unions can combine and by lawful means enforce legitimate demands upon their employers, especially when the strike will result in molesting interstate commerce. A strike may be lawful or unlawful as controlled by the intent, or by the combination to injure, or the means used to coerce employers to accede to the terms of the employees or organization. Under the Interstate Commerce Act (St. L. 1885-87, p. 379) and the amendments thereto, providing that it shall be unlawful for persons to combine or conspire together to hinder or obstruct commerce, a combination or conspiracy of persons to hinder, obstruct or interfere with the management of any such railroad company, by *threats, intimidation, force* or *violence* against such railroad companies or their employees in the discharge of their duties will be enjoined. *Waterhouse v. Comer*, 55 Fed. 149; *U. S. v. Amalgamated Council*, 54 Fed. 994; *R. R. v. Rutherford*, 62 Fed. 796; *U. S. v. Elliott*, 62 Fed. 801; *Toledo R. R. v. Penn. Co.*, 54 Fed. 730; *In re Debs*, 158 U. S. 564. Where a combination or conspiracy exists subjecting interstate commerce and the transportation of the mails to the will of such conspirators equity has jurisdiction to restrain such obstruction and prevent carrying into effect such conspiracy. *In re Debs*, 158 U. S. 564; *U. S. v. Elliott*, 62 Fed. 801. It will be observed that in these cases some malicious act or wilful interference with interstate commerce seems to be necessary. The intent existed to directly interfere with interstate commerce. A distinction is to be drawn between the motive and the object and the means employed. This distinction is a fine one perhaps, yet it is a reasonable and a real distinction. So that if the object is a lawful one equity cannot restrain carrying into effect such intention. Accordingly, where the object is to obtain higher wages and to withdraw from the service of the company if such wages are not granted, no injunction should issue. Otherwise equity would be

compelling the performance of personal services, and this cannot be done by a mandatory injunction. *Lumley v. Wagner,* 1De. G. M. & G. 604; *Toledo R. R. v. Penn. Co.,* 54 Fed. 743. The fact that employees of railroads may quit under circumstances that would show bad faith on their part or a reckless disregard of their contract or of the convenience and interests of both employer and public does not justify a departure from the general rule that equity will not compel employees against their will to remain in the personal service of their employers. *Arthur v. Oakes,* (C. C. A.) 63 Fed. 310 (reversing *Farmer's L. & Tr. Co. v. North Pac. R. R.,* 60 Fed. 803). In *Arthur v. Oakes, supra,* Mr. Justice Harlan says: "Their right as a body of employees affected by the scale of wages to demand given rates of compensation as a condition of their remaining in the service was as absolutely perfect as was the rights of the receivers representing those interested in the trust property. But that is a very different matter from a *combination* or *conspiracy* among employes with the object and intent, not simply of quitting the service of the receiver because of the scale of wages, but crippling the property in their hands and embarrassing the operation of the railroads." *Arthur v. Oakes,* 63 Fed. 310, 320. It is no crime for any number of persons without an unlawful object in view to associate themselves together, and agree that they will not work for or deal with certain men or classes of men, or work under a certain price or without certain conditions. *Carew v. Rutherford,* 106 Mass. 14; *Snow v. Wheeler,* 113 Mass. 186; *Nat. Protective Ass'n v. Duff* (N. Y. Court of Appeals, Apr. 1, 1903). And it is held by the Supreme Court in *Hopkins v. U. S.,* 171 U. S. 578, in effect that agreements among employees of a railroad company which are condemned as in restraint of interstate commerce are such as have some *direct* and *immediate* effect upon such commerce, and do not include agreements not to work for less than a certain sum, or not to work except under certain conditions, even though the cost of interstate traffic would be thereby enhanced.

It is submitted that the test for determining whether a strike or a threatened strike is lawful or unlawful is: (1) If the intent is to interfere directly with interstate commerce, as by crippling the operation of the railroad, the strike is unlawful; (2) If the object is lawful, and there is no intent or *means* used either of force, threats, violence or intimidation having a *direct* effect, the strike is lawful.

LOTTERY TICKETS AND INTERSTATE COMMERCE.

In *Champion v. Ames,* 23 Sup. Ct. Rep. 321, the United States Supreme Court has decided (1) that lottery tickets are subjects of traffic—and of interstate commerce; (2) that transportation of same by common carriers among the States is interstate commerce; (3) that Congress has absolute authority over such commerce (sub-

ject to express constitutional limitations); and (4) that its power to regulate interstate commerce includes the power to prohibit the carriage of lottery tickets, and to destroy traffic of such character.

1. In the extended opinion written by Mr. Justice Harlan, the development of the legal conception of "commerce" was traced from Chief Justice Marshall's famous opinion in *Gibbons v. Ogden,* which declared commerce to embrace all intercourse, including navigation and passenger transit; through *Brown v. Maryland,* 12 Wheat. 419, which affirmed the doctrine of Congress's *exclusive* power to regulate; through the *Passenger Cases,* 7 How. 283, declaring a State tax on alien immigrants unconstitutional as infringing on the jurisdiction of the national legislature; and through other clarifying and defining decisions, *Henderson v. Mayor,* 92 U. S. 259; *Pensacola Tel. Co. v. Western Un. Tel. Co.,* 96 U. S. 1, etc. In *Mobile v. Kimball,* 102 U. S. 691, Field, J., said: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in those terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." In 122 U. S. 347 *(W. U. Tel. Co. v. Pendleton),* the extension over "not only the exchange and transportation of commodities, or visible, tangible things, but the carriage of persons and the transmission by telegraph of ideas, wishes, orders and intelligence" was announced, and has subsequently repeatedly been reaffirmed. In *Hanley v. Kansas City Southern Ry.,* 187 U. S. (Feb. 1903), the ultimate *purpose* of the goods or intelligence transmitted was declared immaterial in the following language: "Transportation by others as an independent business is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they have been delivered." (As to private transportation in the case of *Francis v. U. S.* decided at the same time as the *Champion* case the court by a bare majority held that transportation of lottery tickets across a State line by the owner's *own* vehicle was not interstate commerce.) On the foundation of these prior adjudications the court in the case in review says: "They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States; . . . that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts."

2. Considering the question whether lottery tickets were the subject of interstate traffic and therefore proper subjects of congressional regulation or prohibition brought out the dissent of Justices Fuller, Brewer, Peckham and Shiras. On the ground that the tickets represented so much money, payable contingently to the person holding them, and could have been sold, the majority upheld the constitutionality of the act of 1895 forbidding transporta-

tion of lottery tickets between States by agencies other than the United States mails. That the purchaser could not have enforced in the courts his claim for prize money drawn against the South American lottery concern does not change the fact that some value did attach to the tickets. The dissenting justices, however, speaking by Chief Justice Fuller, say: "The lottery ticket purports to create contractual relations and to furnish means of enforcing a contractual right. This is true of insurance policies and both are contingent in their nature, yet this court has held that the issuing of fire, marine, and life insurance policies in one State and sending them to another, to be there delivered to the insured on payment of premium, is not interstate commerce. Tested by the same reasoning, negotiable instruments are not instruments of commerce; bills of lading are, because they stand for the articles included therein hence it has been held that a State cannot tax interstate bills of lading because that would be a regulation of interstate commerce, and that Congress cannot tax foreign bills of lading because that would be to tax the articles exported and in conflict with article 1 of Constitution of United States that 'no tax or duty shall be laid on articles exported from any State.' Lottery tickets are forbidden to be issued or dealt in by the laws of Texas the *terminus a quo,* and by the laws of California or Utah, the *terminus ad quem,* were not vendible, and for this reason also are not articles of commerce. . . . To say that the mere carrying of an article which is not an article of commerce in and of itself nevertheless becomes such the moment it is to be transported from one State to another, is to transform a non-commercial article into a commercial one simply because it is transported. I cannot concede that any such result can properly follow. It would be to say that everything is an article of commerce the moment it is taken to be transported from place to place and of interstate commerce if from State to State."

3. Passing the power of congress to legitimately regulate the carriage of lottery tickets as subjects of traffic and of commerce, the question whether Congress may possess the power to prohibit and destroy was presented. Quoting Marshall in *McCulloch v. Maryland* that while the general government is one of enumerated powers, the court say Congress has large discretion as to the means that may be employed in executing a given power. "Let the end be legitimate, let it be within the scope of the constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution are constitutional." Quoting *Phalen v. Virginia* 8 How. 163, as to duties of government to suppress nuisances injurious to public health and morals, as to the peculiar perniciousness of lotteries, and surveying the national police power, the court asks. "If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not congress, invested with the power to regulate commerce among the

several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another?"

The efforts of States to protect themselves against the mischiefs of undesirable businesses have in many instances been aided by the national legislature, notably by the Sherman Anti-Trust Act, and the Wilson Original Package Act—measures which unquestionably destroyed much of the species of traffic aimed at. See *U. S. v. Freight Asso.*, 166 U. S. 290; *U. S. v. Joint Traffic Asso.*, 171 U. S. 505, and *Addison Pipe Co. v. U. S.*, 175 U. S. 211 (trust cases); *Reid v. Colorado*, 187 U. S. (sustaining prohibition of interstate traffic in diseased cattle); *In re Rahrer*, 140 U. S. 545; *Mugler v. Kansas*, 123 U. S. 623; *Leisy v. Hardin*, 135 U. S. 100, and *Rhodes v. Iowa*, 170 U. S. 412 (original package cases). As to a State's release of its sovereign police power under constitutional provision, see *New Orleans v. Houston*, 119 U. S. 265.

This case, *Champion v. Ames, supra,* has been argued three times before the Supreme Court. The lotteries and express companies were represented by some of the most distinguished lawyers of the country—ex-Senator Edmunds, ex-Secretary Carlisle, Mr. James C. Carter and Mr. William D. Guthrie of New York. Although handed down by a divided court, it would seem that the effect of the decision will be far-reaching not alone in further defining the scope of interstate commerce, but in extending the police regulation of the central government at least to the extent of closer co-operation with the States. The court, however, insists with much particularity that its opinion is not to be taken as a decision on the power of congress to arbitrarily exclude from interstate commerce any article, commodity or thing of whatever kind or nature; and that the precise point passed on is merely that a thing so notoriously immoral, injurious and offensive to the whole people as lotteries may properly be suppressed by the police power of congress.